

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

TOM LEVY and DEBORAH LEVY,

Plaintiffs,

v.

EMCASCO INSURANCE COMPANY,

Defendant.

NOTICE OF REMOVAL

Defendant, EMCASCO Insurance Company (“EMCASCO” or “Defendant”), by and through its undersigned counsel and pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, hereby gives notice of the removal of this action from the Third Judicial District, County of Dona Ana, State of New Mexico, Cause No.: D-307-CV-2017-02606, to the United States District Court for the District of New Mexico, and respectfully states as follows:

I. INTRODUCTION

1. On August 25, 2017, Plaintiffs Tom Levy and Deborah Levy (“Plaintiffs”) commenced this action by filing their Complaint against Defendant, EMCASCO, for Breach of Contract and Bad Faith. *See* State Court Pleadings, attached as Exhibit A.

2. EMCASCO was served with the Complaint on or about September 1, 2017. *See id.*

3. The lawsuit against EMCASCO arises out of Plaintiffs’ claims for property damages arising from a hailstorm that occurred on or about October 3, 2015, over certain property located at 2801 Missouri Avenue, which includes a shopping center called Bonita Plaza (subject property). *Id.*, ¶ 3.

4. Upon information and belief, at the time of the hailstorm, the subject property was owned by Bonita Plaza 1, LLC and Bonita Plaza 2, LLC. *see also id.*, at 8.

5. In their Complaint, Plaintiffs allege that EMCASCO failed to properly evaluate the hailstorm damages to their Property and settle the claims. Plaintiffs allege damages under two theories – breach of contract and bad faith – in this lawsuit against Defendant. *Id.*

6. EMCASCO issued a Business Owners Policy (“Policy”) to Bonita Enterprises LLC that insured the subject property at the time of the loss.

7. Upon information and belief, Plaintiffs, who were not the original owners of the subject property, purchased the subject property from Bonita Enterprises on or about March 22, 2016, *after* the October 3, 2015, hailstorm. *See* Complaint, ¶ 16.

8. Upon information and belief, Bonita Enterprises allegedly assigned its claims under the EMCASCO Policy to Plaintiffs.

9. Plaintiffs assert two claims for relief against Defendant entitled: Breach of Contract (Count I) and Bad Faith (Count II). Plaintiffs seek compensatory damages, consequential damages, exemplary and punitive damages, attorneys’ fees and costs. *See id.*, pages 4-7.

10. Upon information and belief, Plaintiffs seek damages in excess of \$75,000 (seventy five thousand dollars) against Defendant.

II. DIVERSITY JURISDICTION

11. In their Complaint, Plaintiffs assert claims over which this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because: (a) the parties are citizens of different states; and (b) the amount in controversy exceeds \$75,000, exclusive of interest and costs.

A. Complete Diversity of Citizenship Exists.

12. Plaintiff, Tom Levy, is a resident of Dona Ana County, New Mexico. *See* Complaint, ¶ 1, Exhibit A.

13. Plaintiff, Deborah Levy, is a resident of Dona Ana County, New Mexico. *See Id.*

14. EMCASCO is and was at all material times, a foreign corporation domiciled in the State of Iowa and is authorized to write and sell insurance in the State of New Mexico. *See* 28 U.S.C. § 1322(c)(1), *see* Complaint, ¶ 2.

15. For purposes of federal diversity jurisdiction, the parties are completely diverse.

B. The Amount in Controversy Exceeds \$75,000.

16. Although EMCASCO contests liability, Plaintiffs, upon information and belief, seek a monetary judgment against Defendant well in excess of \$75,000. Specifically, Plaintiffs have alleged that they were assigned rights under the insurance policy by Bonita Plaza 1, LLC and Bonita Plaza 2, LLC to pursue Plaintiffs' claim for hailstorm damages. *See* Complaint, ¶ 10, Exhibit A. Even though EMCASCO has paid for damages to the property, Plaintiffs claim an entitlement to additional damages totaling at least \$45,935.00.

17. In addition to the claim for property damages noted above, Plaintiffs seek damages for EMCASCO's conduct including compensatory and consequential damages, punitive and attorneys' fees and costs. *See* Complaint, Exhibit A. Accordingly, the amount in controversy exceeds \$75,000, exclusive of interest and costs.

18. To confer subject matter jurisdiction on this Court based on diversity of citizenship, the amount in controversy must exceed the sum or value of \$75,000.00, exclusive of interest and costs. *See* 28 U.S.C. § 1332 (a). Where a complaint does not contain dispositive allegations of the amount in controversy, the jurisdictional amount is determined by the allegations in the

underlying complaint. *See, e.g., Laughlin v. Kmart Corp.*, 50 P.3d. 871, 873 (10th Cir. 1995). Calculations of the amount in controversy include both compensatory and punitive damages. *See, e.g., Bell v. Preferred Life Assur. Soc'y*, 320 U.S. 238, 240 (1943); *Watson v. Blakinship*, 20 F.3d 383, 386 (10th Cir.1994).

19. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 and, therefore, this action may be removed pursuant to 28 U.S.C. §§ 1441 and 1446.

III. VENUE

20. Venue is proper in the District of New Mexico because this District embraces the location where the state court action is pending.

IV. COMPLIANCE WITH THE RULES

21. All procedural requirements related to the removal of this action have been satisfied.

22. True and correct copies of “all process, pleadings, and orders served upon” EMCASCO in the State Court action are attached hereto as Exhibit A. *See* 28 U.S.C. § 1446(a); D.N.M.LR-Civ. 81.1(a).

23. EMCASCO is timely filing this Notice of Removal through service or otherwise, of a copy of the initial pleading setting forth claims for relief. *See* 28 U.S.C. § 1446(b)(3), (c).

24. EMCASCO filed a Notice of Filing of Notice of Removal in the pending state court action in the Third Judicial District, County of Dona Ana, State of New Mexico, Cause No.: D-307-CV-2017-02606, which is attached hereto as Exhibit B. *See* 28 U.S.C. § 1446(a).

25. A copy of this Notice of Removal will be promptly served upon the Plaintiffs, through their counsel. *See* 28 U.S.C. § 1446(d).

26. Pursuant to Fed.R.Civ.P. 81(c), EMCASCO will present its defenses by pleading at the time prescribed therein, and specifically reserves its right to assert all defenses including those defenses under Fed.R.Civ.P. 12(b).

WHEREFORE, EMCASCO Insurance Company respectfully requests that the action now pending in the Third Judicial District, County of Dona Ana, State of New Mexico, Cause No.: D-307-CV-2017-02606, be removed therefrom to this Court and that all further proceedings be had in this Court.

Respectfully Submitted,

ALLEN LAW FIRM, LLC

/s/ Meena H. Allen
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2017, I filed the foregoing electronically through the e-filing system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Kyle H. Moberly
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/s/ Meena H. Allen
Meena H. Allen